Supreme Court, U.S.
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No.

In The
Supreme Court of the United States
October Term, 1993

NYSA-ILA PENSION TRUST FUND,
by and through its Trustees,
JOHN BOWERS, JAMES A. CAPO, ALBERT CERNADAS,
BART DIMATTINA, JOHN W. MILLARD, RICHARD H.
O'NEILL, ANTHONY PIMPINELLA, and THOMAS POPOLA,

Petitioners,

v.

GARUDA INDONESIA; BANK BUMI DAYA; BANK
NEGARA INDONESIA 1946; BANK DAGANG
NEGARA; and BANK EKSPOR IMPOR INDONESIA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Question Presented For Review

Does the Foreign Sovereign Immunities Act deprive federal courts of jurisdiction to entertain lawsuits by American pension plans to recover from foreign governmental instrumentalities operating commercial enterprises in the United States controlled-group liabilities imposed by the Employee Retirement Income Security Act, as amended by the Multiemployer Pension Plan Amendments Act?

Parties To The Proceeding

All parties in the court of appeals appear in the caption of this petition. It is noted that, pursuant to Sup. Ct. Rule 12.4, all parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this court, unless petitioners notify the clerk of this Court of the petitioners' belief that a party below has no interest in the outcome of the petition. Petitioners have no knowledge of any uninterested party. In accordance with Sup. Ct. Rule 29.1, petitioners state that Petitioner NYSA-ILA Pension Trust Fund does not have a corporate parent, subsidiary, or affiliate.

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No.

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October Term, 1993

NYSA-ILA PENSION TRUST FUND, by and through its Trustees, JOHN BOWERS, JAMES A. CAPO, ALBERT CERNADAS, BART DIMATTINA, JOHN W. MILLARD, RICHARD H. O'NEILL, ANTHONY PIMPINELLA, and THOMAS POPOLA,

Petitioners,

v.

GARUDA INDONESIA; BANK BUMI DAYA; BANK NEGARA INDONESIA 1946; BANK DAGANG NEGARA; and BANK EKSPOR IMPOR INDONESIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Introduction

For many years the Indonesian government enjoyed the privileges and protections of our laws in operating a private, commercial shipping enterprise in the United States. It now refuses to satisfy a valid judgment for pension withdrawal liability owed by the enterprise to fulfill its commitment to provide pension benefits to the longshore workers who had serviced its ships. The government of Indonesia has withdrawn the assets of the enterprise from the United States and has placed them beyond the reach of the longshore pension fund because of the refusal of Indonesian courts to recognize money judgments issued by United States courts.

The longshore pension fund in an effort to overcome this evasive stratagem invoked the controlled group provisions of the Employee Retirement Income Security Act, as amended by the Multiemployer Pension Plan Amendments Act (hereinafter collectively "ERISA/MPPAA"), to recover the unpaid liability from other commercial instrumentalities of the government of Indonesia operating in the United States. The court of appeals thwarted the recovery by concluding that the attribution rules of substantive pension law could not be consulted in applying the commercial activity exception of the Foreign Sovereign Immunities Act ("FSIA"). The circuit court's determination frustrates the purposes of both the FSIA and ERISA/MPPAA by relieving government-owned businesses from the same responsibilities owed by private enterprises to American pension benefit plans. This Court should undo the mischief.

Opinions Below

The judgment and opinion of the court of appeals, which is reported at 7 F.3d 35 (2d Cir. 1993), are reproduced in the appendix to this petition (1a-12a).[1] The unreported opinion and order of the United States District Court for the Southern District of New York are also reproduced in the appendix (13a-19a).

Jurisdiction

The judgment of the court of appeals was entered on October 4, 1993. This petition is filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

Statutes Involved

1. ERISA/MPPAA § 4001(b)(1), 29 U.S.C. § 1301(b)(1) (1988), provides in relevant part:

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[1] References are to the pages of the appendix.

> For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer.

2. The relevant portion of FSIA § 4(a), which is codified at 28 U.S.C. § 1605(a)(2) (1988), provides as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . .

Statement of the Case

A. Controlled Group Withdrawal Liability

ERISA/MPPAA is a comprehensive regulatory regime for private pension plans designed to assure that employees and their beneficiaries will not be deprived of their anticipated retirement benefits by the termination of pension plans before sufficient monies have been accumulated to fund the benefits. *Connolly v. PBGC*, 475 U.S. 211, 214 (1986). ERISA/MPPAA requires an employer withdrawing from a multiemployer pension plan to pay withdrawal liability, which is its proportionate share of the plan's unfunded vested benefits, *see* 29 U.S.C. § 1381 (1988), in order to avoid the adverse consequences that would arise from the employer's leaving behind pension liabilities it had promised to pay but did not fully fund. 475 U.S. at 215-16.

Congress did not restrict responsibility for withdrawal liability to the departing employer alone but extended it to that employer's affiliated businesses as well. ERISA/MPPAA provides that trades and businesses under common control shall be treated as a single, unified employer, *see* 29 U.S.C. § 1301(b)(1) (1988), thus making all members of the controlled group jointly and severally liable for the withdrawal liability incurred by any one of them.[2]

B. Foreign Sovereign Immunities Act

The FSIA, which is codified at 28 U.S.C. §§ 1330; 1332(a)(2)-1332(a)(4); 1391(f); 1441(d); & 1602-1611 (1988 & Supp. II 1990), is the sole source of subject matter jurisdiction for federal courts in cases involving foreign states. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2164 (1992). Under the FSIA a political subdivision or agency or instrumentality of a foreign state is itself treated as the foreign state. 28 U.S.C. § 1603(a) (1988).

Under the FSIA a foreign state is entitled to immunity from suit, unless its conduct falls within one of the statutory exceptions, in which case the foreign state is stripped of sovereign immunity and subject matter jurisdiction prevails. 488 U.S. at 434. The exception at issue in this case is the commercial activity exception, which removes the immunity in any case "in

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[2] *Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1372 (7th Cir. 1992); *Teamsters Joint Council 83 v. CenTra, Inc.*, 947 F.2d 115, 120 (4th Cir. 1991); *Central States Southeast & Southwest Areas Pension Fund v. Chatham Properties*, 929 F.2d 260, 264 (6th Cir. 1991); *Connors v. Ryan's Coal Co.*, 923 F.2d 1461, 1466 (11th Cir. 1991); *I.A.M. Nat'l Pension Fund, Plan A v. Slyman Indus., Inc.*, 901 F.2d 127, 129 (D.C. Cir. 1990); *Board of Trustees of W. Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1013 (9th Cir. 1987); *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 129-30 (3d Cir. 1986); *see also PBGC v. Ouimet Corp.*, 630 F.2d 4, 11 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) (controlled group liability for underfunded terminated single-employer plan).

which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (1988).

C. Facts of this Case

For decades P.T. Djakarta Lloyd ("Djakarta"), a wholly-owned instrumentality of the government of Indonesia, engaged in commercial shipping operations transporting cargo by sea to and from the United States (4a, 14a). Djakarta's ships calling at the Port of New York and New Jersey (hereinafter "NY-NJ Port") utilized the services of longshore workers to load and unload their cargoes (4a, 14a). Djakarta was a party to longshore collective bargaining agreements, which set forth Djakarta's obligations to the longshoremen who serviced its vessels, including the payment of contributions required to fund the costs of pension, welfare, and other employee benefits (4a, 14a).

When Djakarta ceased operating in the NY-NJ Port in 1985, it incurred withdrawal liability under the provisions of ERISA/MPPAA (4a, 14a). When Djakarta failed to satisfy this statutory liability, Petitioner NYSA-ILA Pension Trust Fund (hereinafter "Fund"), the longshore pension plan in the NY-NJ Port (3a), sought redress in the federal courts (4a, 14a). On October 15, 1990, after more than three years of litigation, a judgment of more than $1.3 million was entered in the Fund's favor against Djakarta (4a, 14a). *Bowers v. P.T. Djakarta Lloyd*, 721 F. Supp. 481 (S.D.N.Y. 1989), *modified on reconsideration*, 1990 U.S. Dist. LEXIS 11355 (S.D.N.Y. Aug. 29, 1990). Djakarta did not appeal this judgment, and neither Djakarta nor its parent, the government of Indonesia, has satisfied any part of the judgment (4a, 14a). The Fund is unable to execute on the judgment because no assets of Djakarta can be found in the United States and because the courts of Indonesia do not honor money judgments issued by the courts of the United States (4a-5a, 14a). *See* Hornick, *The Recognition and*

Enforcement of Foreign Judgments in Indonesia, 18 HARV. INT'L L. J. 97, 99, 106 (1977).

Rebuffed in its efforts to obtain the recovery to which it is entitled, the Fund then turned to ERISA/MPPAA's controlled group provisions for relief against the respondents, other wholly-owned commercial instrumentalities of the Indonesian government operating in the United States (2a-3a,14a).[3] On October 22, 1991, the Fund commenced the litigation which is the subject of this certiorari petition, asserting that since Djakarta and the respondents are all commercial instrumentalities wholly owned by the Indonesian government, they are all trades or businesses under common control within the meaning of ERISA/MPPAA § 4001(b)(1), 29 U.S.C. § 1301(b)(1) (1988), and are all jointly and severally liable to the Fund for the unfunded vested pension benefits left behind when the government of Indonesia ceased shipping operations in the NY-NJ Port (2a-3a, 5a, 14a-15a).[4]

D. District Court Opinion

Without any analysis of the legislative purposes of the FSIA or of the controlled group provisions of ERISA/MPPAA or any attempt to harmonize these legislative schemes, the district court in a six-page, unpublished opinion concluded that the action to recover from other members of a controlled group of commercial instrumentalities wholly-owned by the same foreign government the withdrawal liability incurred by another member of the controlled group does not fall within the FSIA's

[3] Respondents are the national airline of Indonesia and four Indonesian banks (3a-4a).

[4] Although jurisdiction was invoked in the complaint under 29 U.S.C. § 1451 (1988), 29 U.S.C. § 1132 (1988 & Supp. III 1991), 28 U.S.C. § 1331 (1988), and 28 U.S.C. § 1332 (1988), the dispositive jurisdictional provision is 28 U.S.C. § 1330 (1988), which was triggered when respondents in their answer raised the FSIA defense. Section 1330 grants original jurisdiction to federal district courts to entertain nonjury civil actions for in personam relief against foreign states and their instrumentalities if they are not entitled to immunity under the FSIA.

commercial activity exception because the action has no relationship to the former entities' own commercial activities in the United States (17a). In the opinion of the district court controlled group status would exist whether or not the instrumentalities engaged in commercial activities in the Untied States, and, therefore, there was no "significant nexus between defendants' commercial activity in this country and the cause of action" (7a, 17a). The district court concluded that the FSIA deprived it of subject matter jurisdiction, and accordingly granted summary judgment dismissing the action (5a, 13a, 19a).[5]

E. Court of Appeals Opinion

The United States Court of Appeals for the Second Circuit affirmed but for different reasons (2a, 7a, 11a-12a). The circuit court considered the commercial activity exception to be a self-contained calculus impermeable to other principles of law (7a-10a). The crux of the circuit court's decision is the proposition: "Before a federal court may apply corporate law, or the controlled group provisions of ERISA or any other rule of law in a case involving a foreign state or instrumentality of that state, it must, as a threshold matter, find an exception to the FSIA's grant of sovereign immunity" (9a). The court of appeals thus foreclosed from the commercial activity analysis any consideration of statutory or decisional rules that would attribute to the instrumentality the commercial activities of another. The court of appeals, therefore, declined to apply the controlled group provisions of ERISA/MPPAA, which would have imputed Djakarta's commercial activities to the respondents and ineluctably triggered the commercial activity exception.

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[5] Because the action was dismissed on jurisdictional grounds, neither the district court nor the court of appeals reached the issue of whether Djakarta and respondents are members of a controlled group under ERISA/MPPAA (9a-10a). Consequently, that issue is not presented to this Court.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Conflicts With Applicable Decisions of This Court.

This Court has explained the contours of the FSIA.

> The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state. Section 1606 of the FSIA provides in relevant part that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . ., the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ." The House Report on the FSIA states:
>
> > "The bill is not intended to affect the substantive law of liability. Nor is it intended to affect . . . the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong."

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 620-21 (1983) (citation omitted).

The decision of the court of appeals violates both principles. It permits the FSIA to affect the attribution of liability among instrumentalities of a foreign state, and it requires that a foreign state be treated differently than a private individual under like circumstances.

Before any lawsuit ever arises, instrumentalities of a foreign state by conducting commercial activities in the United States are unquestionably subject to ERISA/MPPAA to the fullest extent. The decision of the court of appeals creates a scenario whereby, once litigation is commenced, the FSIA makes a significant portion of the legislation -- its attribution features -- no longer applicable to the foreign entity. All of the respondents in this case by virtue of their commercial activities here are still subject to all of the prescriptions of ERISA/MPPAA, save one. They must still make their promised contributions to any pension plans they establish. They must still abide by the vesting, reporting, and disclosure requirements. They must still pay withdrawal liability if they cease operations covered by a multiemployer plan. The only contents of the federal pension statute that do not apply to them are the attribution rules of the controlled group provisions.[6] And it is the FSIA which, under the circuit court's opinion, relieves them from this portion of the statute.

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[6] In an attempt to bolster its refusal to give effect to ERISA/MPPAA's attribution principles, the court of appeals does that which it says should not be done. It looks to the substantive law and claims that the controlled group provisions of ERISA/MPPAA themselves contain the very restriction that prevents their application to the FSIA's commercial activity exception (9a). The common control rule of attribution is explicitly confined by the phrase "for purposes of this subchapter" to the plan termination and withdrawal liability provisions of ERISA/MPPAA. *See* 29 U.S.C. § 1301(b) (1988). The court of appeals reads this limitation as "not purport[ing] to confer jurisdiction on federal courts in cases involving foreign sovereigns" (9a). But this observation is disingenuous because the controlled group provision does not purport to confer jurisdiction in any case regardless of the nationality or status of the defending party. The provision establishes substantive rights and obligations that extend liability to affiliates of the actual employer contributing to the pension plan. In placing the limitation on the scope of the provision, which the court of appeals found so comforting, Congress was concerned only with the internal structure of ERISA/MPPAA. The provision confines the attribution rules to cases involving withdrawal and termination liabilities. The controlled group doctrine does not apply, however, to other portions of the statutory regime, such as extending liability for delinquent contributions, *see* 29 U.S.C. § 1145 (1988), to affiliates of the contributing employer.

It is self-evident that under the circuit court's opinion commercial instrumentalities of a foreign state are not liable in the same manner and to the same extent as private entities under like circumstances. There is no question that private businesses, even those owned by aliens, are subject to the controlled group rules of ERISA/MPPAA. Only if ownership resides in a foreign government, does the circuit court's opinion operate to vitiate these attribution principles. Thus, the Second Circuit permits the FSIA to discriminate between two entities, both foreign, both engaged in the domestic commerce of the United States, both proprietary commercial enterprises, solely because one is private and the other governmentally-owned.

A third departure from this Court's teachings is the circuit court's approach to sovereign immunity. This Court has proclaimed, "The FSIA codifies a restrictive theory of sovereign immunity which confines immunity from suit to a foreign sovereign's public, governmental acts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983). The Second Circuit's opinion does just the opposite. It applies an expansive theory of immunity that bestows on a foreign government's commercial activities a privilege that this Court held was reserved for its sovereign activities only. Respondents in this case are purely commercial enterprises. Their activities are indistinguishable from those conducted by private businesses. Application of ERISA/MPPAA's controlled group principles in no way implicates the sovereign activities of the Indonesian government. To confer sovereign immunity upon the respondents does no more than give them an unfair advantage over their competitors in the private sector.

The Second Circuit's abandonment of applicable decisions of this Court cannot be justified by the FSIA itself. The premise underlying the circuit court's reasoning is that no rule of substantive law may be invoked until after an exception to the FSIA has been established (9a). The statute itself, however, in the

very exception at issue in this case invites recourse to substantive law in determining whether the exception applies. The commercial activity exception is triggered if "the action is based upon the commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (1988). Unless one knows what the elements of the action are, one is powerless to make the analysis required by the exception. Since the exception is triggered if any element of the claim is based upon the foreign instrumentality's commercial activities in the United States, *see Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1478 n.4 (1993), analysis of the substantive law is a necessary part of the adjudicatory calculus. The Second Circuit's prohibition against considering the substantive law leaves one stranded in a jurisprudential *cul-de-sac*.

2. This Case, Which Involves the Interplay of Two Important Federal Statutes, Presents A Substantial Question of National Scope and Importance.

This case involves two areas of national importance -- the extent to which foreign governmental instrumentalities engaged in commercial activities in the United States must comply with our national laws and the protection of vested pension benefits earned by American workers. The issue presented is one of first impression that implicates this Court's supervisory power over the federal judiciary, since resolution of the issue will define the extent of federal court jurisdiction over foreign governmental instrumentalities.

Congress enacted ERISA/MPPAA to safeguard the retirement benefits of American workers. *Connolly v. PBGC*, 475 U.S. 211, 214 (1986). The controlled group provisions of that legislation ensure that employers do not take unfair advantage of their employees by obtaining labor on the promise of providing a secure retirement and then reneging on that promise by abandoning their inadequately funded pension plans.

One of the principal goals of the FSIA is to treat commercial instrumentalities of foreign states in the same manner and to the same extent as private enterprises under like circumstances. *First Nat'l City Bank*, 462 U.S. at 620-21 (1983). Thus, if each member of a controlled group of private commercial enterprises is responsible for the withdrawal liability of every other member, the same rules should prevail if the controlled group is comprised of proprietary instrumentalities owned by a foreign government.

The decision of the court of appeals vitiates the fundamental legislative purposes and policies of both ERISA/MPPAA and the FSIA. It frustrates ERISA/MPPAA's enforcement mechanism by shielding commercial instrumentalities of foreign states from ERISA/MPPAA's controlled group doctrine. Indonesia and other foreign governments can now withdraw from multiemployer pension plans with impunity, knowing full well that the unfunded benefits they leave behind will not be enforceable against their other commercial enterprises in the United States. In light of the expanding role of foreign nationalized industries in the United States, the threat to ERISA/MPPAA's legislative goals created by the circuit court's decision is real and national in scope.[7]

Unequal application of the same substantive law as between instrumentalities of foreign states and similarly-situated private commercial entities runs directly counter to the FSIA's express proscription of disparate treatment. 28 U.S.C. § 1606 (1988). The FSIA was not meant to give an unfair competitive advantage to foreign governmental instrumentalities over their counterparts in the private sector. Yet that is exactly what the court below has now wrought, and it has done so at the expense of the American worker. Foreign governments now know that

[7] In the maritime industry alone there are more than thirty state-controlled vessel carriers serving the United States trades. 54 Fed. Reg. 25903, 25904 (1989). Legions of state airlines, trading cooperatives, banks, and other foreign governmental instrumentalities also ply their trades in the commerce of the United States.

they can attract American workers to their commercial enterprises by promising a level of pension benefits, whose cost would be prohibitive for private enterprises, without any fear of ever having to fully fund those benefits.

A decision with such far-reaching implications should be reviewed by this Court. If foreign governmental instrumentalities employing American workers are to be given a special dispensation under American pension law, it should come from this Court.

Conclusion

The Second Circuit has decided an important question of federal law in a way that is antagonistic to applicable decisions of this Court. The decision of the court of appeals seriously undermines the policies and goals of two important federal statutes. Review by this Court is necessary to prevent untold harm to American pension plans whose contributors include foreign governmental instrumentalities. A writ of certiorari should be granted.

Dated: New York, New York
December 23, 1993

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